

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

Judge David Folsom

PALTALK HOLDINGS

V.

MICROSOFT

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CIVIL NO. 2:06CV367

ATTORNEY FOR PLAINTIFFS:

David Marcus; Michael Heim; Douglas Wilson;
Kalpana Srinivasan; Max Tribble; John Ward Jr.;
Chris Bunt; Elizabeth DeRieux; Brook Taylor; Jeff
Rambin

ATTORNEY FOR DEFENDANTS:

Richard Cederoth; Bill Lavender; David Pritikin;
Harry Gillam; Stacy Quan; Thomas Rein

TECHNICAL ADVISOR:

LAW CLERK:

Michael Bittner and Lon Outland

COURTROOM DEPUTY:

Mel Martin

COURT REPORTER:

Judy Werlinger

JURY TRIAL

March 9, 2009 @ 9:00 am

OPEN: 9:04

ADJOURN: 3/12/09, 9:33 am

9:04 ct opens; ct/ preliminary instructions; rule is invoked;

9:17 Tribble/ opening;

9:59 Pritikin/ opening;

10:42 recess;

11:04 ct resumes;

11:04 Tribble/ calls **Jason Katz**; sworn; direct;

11:35 Pritikin/ cross of **Jason Katz**

11:36 BC;

11:37 Pritikin/ cross;

11:59 jury steps out;

11:59 ct/ issues of the slide which exhibit or aid;

12:00 Pritikin/ they can put it back on the screen; motion in limine # 28;

12:02 Tribble/ responds;

12:03 Pritikin/ award page may also misrepresent;

12:04 ct/ any issues we anticipate for aids tomorrow;

12:04 Pritikin/ no;

12:05 recess;

1:26 ct opens outside the presence of the jury;

1:26 ct/ this is an aid and not an exhibit, issue discussed before lunch; I don't believe that this opened the door; ct/ will make this a part of the record, cts 1;

1:27 recess

1:28 ct resumes;

1:28 Pritikin/ continues with cross;

1:54 Tribble/ re-direct;

1:56 ct/ address' the jury;

1:56 Marcus/ interim statement; 2:00 Marcus/ calls **Dan Samuel** by video deposition; 2:12 interim statement; 2:14 Marcus/ calls **Jeffrey Rothschild** by video deposition

2:53 Heim/ calls **Thomas Rhyne**; sworn; direct

3:28 recess;

3:50 ct resumes;

3:50 Heim/ continues with direct of **Thomas Rhyne**;

4:57 jury steps out

4:57 ct/ how much direct remaining;

4:57 Heim/ one and a half hours

4:58 Pritikin/ would like to take up one issue re: Dr. Rhyne;

4:58 Heim/ responds;

4:59 ct/ jury has good flavor of what this game is about; subpoena issue;

4:59 Gillam/ Judge Everingham has ruled on it;

4:59 ct/ what is that ruling;

5:00 Gillam/ responds;

5:00 ct/ do any of you want the ct to review this decision;

5:00 Pritikin/ would like time to look it over;

5:00 ct/ when do you expect to call this witness;

5:00 Heim/ tomorrow afternoon;

5:01 Tribble/ several depositions and then will call Ms. Quan;

5:01 ct/ tomorrow;

5:01 Tribble/ order of depositions for tomorrow;

5:02 recess;

5:01 ICC Ward, Tribble, Pritikin, Marcus, Gillam; ct/ dial up vs high speed; Pritikin/ relates to damages; ct/ ruling by Judge Everingham; motion that will give us guidance; Gillam/ do have a motion withdrawn 3 and 6; plf won't go into 5; 1 and 2 quashed and they listed a corporate rep. they are entitled to put her on stand and question her; but don't get into privileged areas; Ward/ issue with Ms. Quan; ct/ let me know if you are going to file objections; Pritikin/ in writing or orally; ct/ orally is fine; 5:07 recess;

5:07 ICC with plfs, Ward, Tribble, Marcus and Jason Katz (rep); 5:24 ICC with dfts, Pritikin, and Gillam; 5:25 recess

2nd DAY OF JURY TRIAL, TUESDAY, 3/10/09

8:32 ICC with Ward, Tribble and Jason Katz (rep); Tribble/ don't want to make proposal; ct/ can continue with Judge Faulknor; 8:35 recess 8:35 ICC with Pritikin and Gillam; Pritikin/ appreciate your efforts 8:36 recess; 8:37 ICC with Ward, Tribble, Pritikin, and Gillam; Pritikin/ trial subpoena served on Stacy Quan; all quashed or withdrawn except for 4 and 7; ct/ are you raising objection to Judge Everingham order; won't need her until tomorrow; Tribble/ suspect that is true; ct/ go on record after lunch; Pritikin/ other issue; license agreements, Citric and Midway; ct/ have that issue; Pritikin/ produced March '08; ct/ under threat of litigation; Pritikin/ not under threat and should be admitted; Ward/ don't object to Midway; ct/ an issue we should take up on the record; return after lunch around 1:15pm; 8:44 recess;

8:59 ct opens;

9:00 Heim/ continues with direct of **Thomas Rhyne**;

9:42 BC;

9:43 Heim/ continues with direct;

10:29 recess;

10:50 ct resumes;

10:50 Heim/ continues with direct;

11:39 Pritikin/ cross of **Thomas Rhyne**;

11:57 jury steps out;

11:57 ct/ trial subpoena issue;

11:57 recess;

1:01 ct resumes outside the presence of the jury;

1:01 ct/ trial subpoena issue

1:02 Pritikin/ 2 that are left are 4 and 7;

1:04 Ward/ responds;

1:06 Pritikin/ reply

1:07 Ward/ tried to get an agreement to get some of those individuals here for trial and they said no;

1:08 Pritikin/ they have the depositions and they will be here;

1:08 ct/ will review depo and will rule before she is called;

1:08 Pritikin/ one other issue; Midway has been resolved and it is DX 256;

1:09 ct/ let it be admitted;

1:09 Pritikin/ only issue as to Citric (sp); already a plfs exhibit; feel ship is sailed

1:09 ct/ anticipation of litigation

1:09 Ward/ responds;

1:10 ct/ were those taken up before Judge Everingham;

1:10 Ward/ don't think he gave an expressed ruling;

1:10 ct/ bring those to the attention of Judge Everingham and let him rule;

1:11 Ward/ responds; and made a finding

1:11 ct/ so you are appealing his ruling;

1:11 Ward/ yes;

1:11 ct/ if not a final ruling bring it to his attention; follow same method as all other exhibits;

1:12 Tribble/ one final thing; motion in limine; and would like to avoid any other mention of another game; plfs 16;

1:13 ct/ summary indicates that it would be covered;

1:14 Pritikin/ responds;

1:14 ct/ don't find that violation was intentional; don't go past that line of questioning;

1:15 recess;

1:30 ct resumes;

1:30 Pritikin/ continues with cross of **Thomas Rhyne**;

2:11 Heim/ re-direct;

2:21 Pritikin/ re-cross;

2:22 Tribble/ **Craig Henry** by deposition;

2:23 Srinivasan/ interim statement; 2:24 video deposition of **Craig Henry**;

2:52 Tribble/ Jon Grande by deposition; technical glitch there were 2 more minutes left on Craig Henry deposition;

2:52 Marcus/ correction there were 6 minutes;

2:52 ct/ play those 6 minutes;

3:05 Tribble/ deposition of **Jon Grande**

3:05 Srinivasan/ interim statement; 3:06 **Jon Grande** by video deposition;

3:41 jury steps out;

3:42 ct/ what does that leave us with for the rest of the afternoon;

3:42 Tribble/ responds; Ms. Quan, 2 depositions; and then Mr. Nawrocki;

3:43 ct/ critical to play those after her testimony;

3:43 Tribble/ responds;

3:43 ct/ testimony concerning category 4; will allow some questions; issue of privilege; by way of guidance would like some short briefing; up to 10 pgs by 7pm tonight; and reply 5 pgs by 8:30pm; let jury go home early

3:44 Marcus/ absolutely;

3:45 Ward/ clarification on briefing;

3:45 ct/ general briefing on issue of privilege with corporate rep. and corporate counsel;

3:45 Ward/ responds;

3:45 ct/ my understanding we had category 4 and 7 unresolved;

3:46 Ward/ correct; but other issue

3:46 ct/ haven't looked at transcript and will rule on that issue;

3:47 Pritikin/ address' the ct;

3:47 ct/ subject of privilege;

3:47 Pritikin/ important for us to know where they are going;

3:47 ct/ giving opportunity to brief issue of privilege; designate corporate counsel as corporate representative;

3:48 Pritikin/ will argue that in the briefs;

3:48 ct/ not convinced that she can't be called as a witness;

3:49 jury returns;

3:52 ct/ address' the jury;

3:53 jury leaves for the day;

3:53 Pritikin/ would like interim tomorrow; will move for JMOL after they rest;

3:54 ct/ don't require written motions at close of plfs case;

3:55 Tribble/ will also be giving interim statement;

3:55 ct/ let's talk about tomorrow; assuming we finish early than expected who would you expect to call;

3:55 Pritikin/ Nielsen and then Chen;

3:56 Tribble/ we plan on cutting down the depositions a little more;

3:56 recess;

3rd DAY OF JURY TRIAL, WEDNESDAY, 3/11/09

8:35 ICC with Ward, Marcus, and Pritikin; ct/ will not allow testimony of Ms. Quan; she is also designated as counsel of record; plf damage expert and putting you on notice; Pritikin/ one other issue; what other games that can be played using Xbox live; Marcus/ motion in limine is pretty clear; ct/ expert done to separate from universe of damages; Marcus/ responds; Pritikin/ part of plf burden to show; will call our expert next week;

Ward/ would like to go on record re: issue with Ms. Quan; Marcus/ pulling depos and will start with Mr. Nawrocki; Pritikin/ witness on will call Mr. Isensee; ct/ was agreement to have him here; Pritikin/ he is in Seattle; ct/ if commitment was to have him here I will let them call him out of order; Marcus/ he was a will call; Pritikin/ it didn't say live; ct/ did you depose him; Marcus/ yes; ct/ will let you play that and if needed can do it out of order; have I ruled on that; schedule for day; Pritikin/ responds; 8:44 recess;

8:53 ct opens outside the presence of the jury;

8:53 ct/ read briefing re: Ms. Quan's testimony; cts ruling;

8:55 Ward/ address' the ct;

8:57 Pritikin/ interim statement;

8:58 recess;

9:05 ct opens;

9:06 ct/ Microsoft would like to make an interim statement;

9:06 Pritikin/ interim;

9:14 Tribble/ interim statement response;

9:20 Marcus/ calls **James Nawrocki**; sworn; direct;

10:30 recess;

10:51 ct opens outside the presence of the jury;

10:51 Pritikin/ one brief issue;

10:51 ct/ responds;

10:51 recess

10:51 ct opens;

10:52 Marcus/ continues with direct of **James Nawrocki**;

10:56 recess;

10:57 ct address' the ptys outside the presence of the jury;

10:57 recess;

11:08 ct resumes;

11:08 Marcus/ continues with direct of **James Nawrocki**;

11:44 Heim/ cross;

12:01 recess;

1:20 ICC with Ward, Tribble, Gillam, and Pritikin; Ward/ will rest after Nawrocki and would like Microsoft to have somebody here that can testify as a corporate representative; ct/ you obviously knew that she was an attorney of record; you said you had other witness' to bring that out with; Tribble/ Mr. Isensee; ct/ will let you re-open and can rest subject to playing that deposition; ct/ not going to order them to bring somebody else; Pritikin/ ½ hour left on cross; Tribble/ next witness will be Nielsen; Pritikin/ yes and Mr. Chen; ct/ will that be enough for today; Pritikin/ I think so; Tribble/ Mr. Chen; ct/ not going to try discovery disputes; 1:27 recess;

1:34 ct resumes;

1:34 Heim/ continues with cross;

1:56 BC

1:57 Heim/ continues with cross

2:20 Marcus/ re-direct;

2:25 BC

2:26 Marcus/ continues with re-direct;

2:27 Tribble/ plf rests;

2:27 ct/ one deposition that you need to edit before playing; need to take up a few matters outside the presence of the jury;

2:28 jury steps out;

2:28 ct/ do I need to rule on any objections

2:29 Tribble/ yes sir

2:29 ct/ will rule on those tonight; when I get a final copy of deposition with designations and

objections;

2:30 Tribble/ can give it to them in 30 mins;

2:30 Pritikin/ don't know if there are;

2:30 ct/ let me know by end of the day; rule 50 now or after they fully rest;

2:32 Pritikin/ feel comfortable doing that now; and have a written motion; 2:32 argues Rule 50 motion;

2:37 Tribble/ response;

2:40 Heim/ continues with response;

2:40 ct/ one last point; read balance of written motion; and have you read that

2:41 Tribble/ it was just handed to me;

2:41 ct/ take a break for you to read it;

2:41 recess;

2:52 ct opens outside the presence of the jury;

2:52 Heim/ have quickly looked at it and can file a response;

2:53 ct/ would like you to file a response before start of court tomorrow and can respond orally as well;

2:53 Heim/ responds to rule 50 motion;

3:02 ct/ will conditionally deny it and may renew at the time that the plfs close fully; and will rule finally at that time;

3:02 jury returns

3:03 Pritikin/ calls **Bill Nielsen**; sworn; direct;

3:59 Srinivasan/ cross;

4:34 Pritikin/ re-direct;

4:35 Pritikin/ calls **Tony Chen**; sworn;

4:35 Cederoth/ direct of **Tony Chen**;

4:46 Tribble/ cross

4:50 BC

4:51 Tribble/ continues with cross;

5:01 jury leaves for the day;

5:01 ct/ left for tomorrow; 20 mins of Mr. Chen and how much of the deposition;

5:02 Tribble/ don't know

5:02 ct/ then you will rest fully; what else do we have left from Microsoft;

5:02 Pritikin/ finish Chen, then start with Mr. Fries; then Kwiatkowski depo; then 2 live witness' Olson and Harmon; then 2 additional depositions that relate to prior art;

5:03 ct/ is there a ruling on those; will have a ruling tomorrow morning;

5:04 recess

4th DAY OF JURY TRIAL; THURSDAY, 3/12/09

8:36 ICC Tribble, Ward, Pritikin, Cederoth, Gillam; Cederoth/ re: Mr. Chen be clear that we are not going to re-try issue before jury; ct/ that is my order; Ward/ issue on Microsoft charitable giving and opened door to bad acts; ct/ sure you think it hasn't but I will give it some thought who would you want to call; Ward/ responds; ct/ will take that under advisement and they have a pretty good agreement; Pritikin/ would like to file a brief; ct/a re you making any progress and can the ct be of any help; 8:42 ICC with plfs 8:46 ICC w/ dfts; 8:49 recess; 9:07 ICC with Gillam and Ward; Gillam/ update; Ward/ responds; 9:08 recess; 9:16 pty announce settlement;

9:27 ct opens;

9:27 ct/ dictate terms of settlement;

9:27 Pritikin/ want it to be sealed and not on the public record;

9:27 ct/ very well;

9:28 Tribble/ would be pleased if the court would resolve any issues with the terms;

9:28 Pritikin/ agrees;

9:28 ct/ very well; suggest;

9:31 jury steps in

9:31 ct/ address' the jury;

9:32 jury steps out;

9:33 recess